Chye Choon Foong & Anor v Ho Kui Moi (f)

HIGH COURT (JOHOR BAHRU) — CIVIL SUIT NO 23NCVC-16–02 OF 2012
TEO SAY ENG JC
13 MAY 2013

Land Law — Sale of land — Agreement — Sale of land to make profit — Joint venture agreement — Whether there was inducement to sign memorandum of transfer — Withdrawal of entitlement of shares on land — Declaration cum trust deed — Whether plaintiffs entitled to respective shares — Whether declaration cum trust deed valid in law and binding — Whether subsequent documents made and signed by plaintiffs had effectively revoked shares

Madam Chia and her husband ('Mr Tan') brought the first plaintiff together with the defendant's husband ('Mr See') to see Miss Serene Ong ('PW1') in her office, Messrs LM Ong & Co to scrape off a short option agreement and prepare a new one, which PW1 did to secure purchasers for two pieces of land administered by Madam Chia. The first plaintiff and Mr See wanted to find a buyer for the said lands and make a profit out of that and a joint venture agreement ('JVA') of three partners was formed consisting Mr See, the first plaintiff and one Mr Tang who would first purchase the said lands from Madam Chia and in turn sell the said lands to Genting Impian in which Mr See and Mr Tang were the directors. Genting Impian would then sell or lease one piece of the said land ('Lot 1699') to Mobil Oil Malaysia Sdn Bhd ('Mobil Oil Malaysia') for a higher sum of money which would be used to pay the purchase price of the two pieces of land sold to the joint venture business by the vendor. The defendant was then elected by all the joint venture partners as their nominee to represent all of them in the sale of the two pieces of land. Mr Tang, being a dealer in Mobil Oil Malaysia would secure the latter to agree to lease the piece of land for a sum of RM3.4m. PW1 explained that no JVA was prepared because one of the three joint venture partners, the second plaintiff could not come and so a declaration cum trust deed ('exh P3') was prepared and was a unilateral agreement which the defendant could do on her own. However, Mr See then informed the plaintiffs that PW1 allegedly committed some unlawful acts contrary to the terms and conditions of exh P3. It was at this stage that the plaintiffs discovered and realised that the defendant and Mr See had somewhere along the line decided to cheat the plaintiffs of the agreed share in Lot 1699. The plaintiffs were informed by PW1 that the land owners had signed the memorandum of transfer and Mr See attempted to induce PW1 into transferring the piece of land to the defendant on false allegations that the plaintiffs had withdrawn their entitlement of shares on the piece of land. By virtue of exh P3, the plaintiffs alleged that they were entitled to their respective

shares as their profits for the successful lease of the piece of land to Mobil Oil Malaysia and the defendant as the nominee of the joint venture partners had failed or refused to transfer the shares to the plaintiffs. The issues that arose were whether exh P3 was valid in law and binding on the defendant; and whether the subsequent documents made and signed by the plaintiffs respectively had effectively revoked their respective shares.

Held, dismissing claim with costs of RM10,000:

(1) It was sufficient to plead in the defence that exh P3 was void and a document might be void for various grounds and the defendant was entitled to rely on any ground based on the evidence adduced during the trial to prove that exh P3 was void on the ground that it was an incompletely constituted trust. Even if the defendant could prove that exh P3 was an incompletely constituted trust, the court must still render assistance to the plaintiffs' beneficiaries who were not volunteers as they had played their respective roles which were tantamount to considerations to the sale and purchase transactions. However, exh P3 couched in the terms of trust deed was intended to be part of a JVA (see paras 43–44).

(2) It had been established that there was a verbal JVA entered by the three joint venture partners and the terms and conditions of such JVA were reduced into writing in exh P3 which was agreed to and signed by the defendant alone. The plaintiffs have also proved that the first plaintiff had furnished consideration by introducing Madam Chia to Mr See and the defendant and Mr Tang who named the second plaintiff as his nominee had also agreed to secure Mobil Oil Malaysia Sdn Bhd to lease Lot 1699 from Genting Impian. Exhibit P3 was a valid document and the defendant was bound by its terms and conditions. The plaintiffs had canceled their participation in the joint venture and had surrendered back their respective shares to the defendant as envisaged in exh P3 (see paras 46–50).

(3) The plaintiffs' allegations that the contents of the letters and the statutory declarations were fabricated by Mr See and the said letters and the statutory declarations were solely for the purpose of using such documents as evidence to contest Messrs LM Ong & Co were totally baseless and should be rejected outright. The letters were voluntarily signed by the plaintiffs. They were fully aware of their contents. There was no evidence to show that the plaintiffs were forced to sign the said letters or they were cheated of their contents. They were therefore bound by the terms (see paras 53–54).

(4) The plaintiffs knew the contents of the statutory declarations which they signed. Under the circumstances, the plaintiffs were therefore bound by what they had sworn in their respective statutory declarations. They

could not deny the truth of the contents of such documents. They knew the consequences of giving any false statements under oath (see para 55).

[Bahasa Malaysia summary

Madam Chia dan suaminya ('En Tan') telah membawa plaintif pertama bersama-sama dengan suami defendan ('En See') bertemu dengan Cik Serene Ong ('PW1') di pejabatnya, Messrs LM Ong & Co untuk membatalkan perjanjian opsyen pendek dan menyediakan perjanjian yang baru, yang mana telah dilakukan oleh PW1 untuk mendapatkan pembeli-pembeli bagi dua bidang tanah yang ditadbir oleh Madam Chia. Plaintif pertama dan En See ingin mendapatkan pembeli bagi tanah-tanah tersebut dan mengaut keuntungan daripadanya dan satu perjanjian usaha sama ('PU') antara tiga orang rakan kongsi dibentuk yang mana terdiri daripada En See, plaintif pertama dan seorang yang bernama En Tang yang akan membeli tanah-tanah tersebut terlebih dahulu daripada Madam Chia dan kemudian menjualnya kepada Genting Impian yang mana En See dan En Tang merupakan pengarah-pengarah. Genting Impian akan kemudiannya menjual atau menyewakan satu bahagian daripada tanah tersebut ('Lot 1699') kepada Mobil Oil Malaysia Sdn Bhd ('Mobil Oil Malaysia') dengan jumlah wang yang lebih tinggi yang kemudiannya akan digunakan untuk membayar harga belian ke atas dua bidang tanah yang dijual kepada perniagaan usaha sama oleh penjual. Defendan kemudiannya dilantik oleh kesemua rakan kongsi usaha sama sebagai penama untuk mewakili mereka dalam jualan kedua-dua tanah tersebut. En Tang, sebagai pengurus Mobil Oil Malaysia akan memastikan Mobil Oil Malaysia bersetuju menyewakan satu bahagian daripada tanah tersebut bagi jumlah RM3.4 juta. PW1 menjelaskan bahawa tiada PU yang disediakan kerana salah seorang daripada tiga rakan kongsi PU, plaintif kedua tidak boleh hadir dan satu deklarasi merangkap surat akuan amanah ('eksh P3') telah disediakan dan merupakan satu perjanjian satu pihak yang mana boleh dilakukan sendiri oleh defendan. Walau bagaimanapun, En See kemudiannya memaklumkan plaintif-plaintif bahawa PW1 kononnya telah melakukan beberapa tindakan yang salah di sisi undang-undang bertentangan dengan terma dan syarat eksh P3. Pada peringkat ini, plaintif mendapati dan menyedari bahawa defendan dan En See telah memutuskan untuk menipu plaintif-plaintif mengenai perkongsian yang dipersetujui ke atas Lot 1699. Plaintif-plaintif telah dimaklumkan oleh PW1 bahawa pemilik-pemilik tanah telah menandatangani memorandum pindah milik dan En See cuba untuk mempengaruhi PW1 agar memindah milik bidang tanah tersebut kepada defendan atas dakwaan salah bahawa plaintif-plaintif telah mengeluarkan hak-hak mereka ke atas syer-syer tanah tersebut. Di bawah eksh P3, plaintif-plaintif mendakwa bahawa mereka berhak ke atas syer masing-masing kerana keuntungan bagi sewaan yang berjaya bagi bidang tanah tersebut kepada Mobil Oil Malaysia dan defendan sebagai penama bagi rakan-rakan kongsi usaha sama tersebut telah gagal atau enggan memindah milik syer-syer tersebut kepada plaintif-plaintif. Isu-isu yang timbul adalah sama ada eksh P3

sah di sisi undang-undang dan mengikat ke atas defendan; dan sama ada dokumen-dokumen yang dibuat terkemudian dan ditandatangani oleh setiap plaintif dengan efektifnya membatalkan syer-syer masing-masing.

Diputuskan, menolak tuntutan dengan kos sebanyak RM10,000:

(1) Adalah memadai untuk memplidkan pembelaan bahawa eksh P3 adalah tidak sah dan satu-satu dokumen mungkin tidak sah bagi pelbagai alasan dan defendan berhak untuk bersandarkan pada mana-mana alasan berdasarkan keterangan yang dikemukakan semasa perbicaraan untuk membuktikan bahawa eksh P3 adalah tidak sah atas alasan bahawa ia merupakan penubuhan amanah yang tidak lengkap. Jika pun defendan boleh membuktikan bahawa eksh P3 adalah penubuhan amanah yang tidak lengkap, mahkamah semestinya memberikan bantuan kepada pemegang-pemegang amanah plaintif-plaintif yang bukan sukarelawan kerana mereka telah memainkan peranan masing-masing yang terjumlah kepada balasan kepada transaksi jual beli. Walau bagaimanapun, eksh P3 yang diselaraskan dalam terma surat ikatan amanah, diniatkan untuk menjadi sebahagian daripada PU (lihat perenggan 43–44).

(2) Telah dibuktikan bahawa terdapat PU lisan yang dimasuki oleh ketiga-tiga rakan kongsi usaha sama tersebut dan terma dan syarat usaha sama tersebut telah dimasukkan dalam eksh P3 yang dipersetujui dan ditandatangani oleh defendan seorang. Plaintif-plaintif juga membuktikan bahawa plaintif pertama telah melengkapkan balasan dengan memperkenalkan Madam Chia kepada En See dan defendan dan En Tang yang telah menamakan plaintif kedua sebagai penamanya telah bersetuju untuk mendapatkan Mobil Oil Malaysia Sdn Bhd agar menyewa Lot 1699 daripada Genting Impian. Ekshibit P3 adalah satu dokumen sah dan defendan terikat dengan terma dan syaratnya. Plaintif-plaintif telah membatalkan penyertaan mereka dalam usaha sama tersebut dan menyerahkan syer-syer masing-masing kepada defendan seperti yang dimaksudkan oleh eksh P3 (lihat perenggan 46–50).

(3) Dakwaan-dakwaan plaintif bahawa kandungan surat-surat dan bahawa deklarasi statutori telah dipalsukan oleh En See dan surat-surat dan deklarasi-deklarasi statutori tersebut adalah bertujuan semata-mata untuk menggunakan dokumen-dokumen tersebut sebagai keterangan untuk mencabar Messrs LM Ong & Co adalah tidak berasas dan semestinya ditolak secara terang-terangan. Surat-surat tersebut telah ditandatangani oleh plaintif-plaintif secara sukarela. Mereka sedar akan kandungan tersebut sepenuhnya. Tiada keterangan untuk menunjukkan bahawa plaintif-plaintif dipaksa menandatangani surat-surat tersebut atau bahawa mereka ditipu dengan kandungannya. Mereka, dengan itu, terikat dengan terma-terma (lihat perenggan 53–54).

(4) Plaintif-plaintif mengetahui kandungan deklarasi statutori yang mereka tandatangani. Dalam hal keadaan sedemikian, plaintif-plaintif adalah dengan itu terikat dengan keterangan bersumpah mereka dalam deklarasi statutori masing-masing. Mereka tidak boleh menafikan kebenaran kandungan dokumen tersebut. Mereka mengetahui akibat memberi pernyataan palsu di atas sumpah (lihat perenggan 55).]

Notes

For cases on appearence, see 8(2) *Mallal's Digest* (4th Ed, 2013 Reissue) paras 4587–4590.

Cases referred to

Borneo Housing Mortgage Finance Bhd v Time Engineering Bhd [1996] 2 MLJ 12, FC (refd)

Koperasi Wanita Sarawak Bhd & Anor v Robert Sim Teck Hock [2005] 4 MLJ 493, CA (refd)

L Parthiban (Shobana Mala with him) (L Parthiban Zulkiflee & Associates) for the plaintiffs.

Gan Techiong (Gan & Lim) for the defendant.

Teo Say Eng JC:

THE PLAINTIFF'S CASE

[1] Sometime in June 1993, Madam Chia Kah Gek and her husband one Mr Tan brought the first plaintiff together with one Mr See Tian Sung (Mr See) to see Miss Serene Ong ('PW'1) in her office (Messrs LM Ong & Co). They brought her ('PW1') a short option agreement which they said they wanted to scrape it and asked her to prepare a fresh one. So she prepared a fresh option agreement dated 27 June 1993 purportedly given by Madam Chia to the first plaintiff to secure purchasers with regards to the sale two pieces of land known as EMR No 277 Lot 1068 and EMR 278 Lot 1069 ('exh P1') ('the said lands').

[2] The owner of the said lands was the estate of Chia Chin Tuang and Lim Siam Eng which was administered by Madam Chia Kah Gek ('Madam Chia') as the administratrix of the estate. Leave from the court had been obtained to sell the said lands within two years from the date of the order.

[3] The first plaintiff could not find a buyer. He asked Mr See to help to look for one. They (Mr See, Madam Chia, Mr Tan (Madam Chia's husband and the first plaintiff) came to see Miss Serene Ong ('PW1') with an option to sell ('IDD15') dated 1 November 1993 granted by Madam Chia to Ho Kui Moi (the defendant). They discussed about what to do with the said lands.

[4] Basically Madam Chia wanted to sell the said lands and the first plaintiff and Mr See wanted to find a buyer for the said lands and make a profit out of that. They planned to get a buyer to sign the sale and purchase agreement within two years from the court order which granted leave to sell the said lands.

[5] Mr See proposed to form a joint venture by three partners that is Mr See, the first plaintiff and Mr Tang Choo Chai ('PW3', Mr Tang) who would first purchase the said lands from the vendor (Madam Chia) and would in turn sell the said lands to one company named Genting Impian in which Mr See and Mr Tang were the directors.

Genting Impian would then sell or lease one piece of the said lands that is Lot 1069 to one oil company for a higher sum of money which would be used to pay the purchase price of the two pieces of land sold to the joint venture business by the vendor. So the profit of the joint venture was Lot 1068 to be shared by the joint venture partners.

[6] The defendant was then elected by all the joint venture partners as their nominee to represent all of them in the sale of the two pieces of land because Mr See and Mr Tang had secured a purchaser that is Genting Impian in which Mr See and Mr Tang were directors and they did not want third parties to have knowledge that they had interest in the sale of the said lands. Whereas Mr Tang, being a dealer in Mobil Oil Malaysia Sdn Bhd would secure Mobil Malaysia Sdn Bhd to agree to lease Lot 1699 for a sum of RM3.4m to operate as a petrol pump from Genting Impian.

PW3 had appointed his wife the second plaintiff to be his nominee in the joint venture partnership.

[7] The first plaintiff, Mr Tang, Mr See and Madam Chia agreed to appoint Miss Serene Ong of Messrs LM Ong & Co as the solicitor for the transaction and upon the consent of the parties, the following documents were prepared by Miss Serene Ong:

(a) Agreement dated 21 December1993 between the defendant and the vendor Madam Chia and a deposit of RM50,000 was paid to the vendor.

(b) The declaration cum trust deed cum power of attorney dated 6 January 1994 (exh P3). The terms and conditions of the joint venture were stated in P3.

Miss Serene Ong explained that why no joint venture agreement was prepared was because one of the three joint venture partners that is, the second plaintiff could not come and so a declaration ('P3') was prepared and was a unilateral agreement which the defendant could do on her own.

[8] Another sale and purchase agreement was executed on 20 May 1994

between the defendant and Madam Chia to increase the purchase price from RM2,392,259.43 to RM2,511,929.64 ('D49').

[9] Then the defendant signed the sale and purchase agreement dated 29 July 1994 with Genting Impian Sdn Bhd for the sale of land held under EMR 278 Lot 1699 for a purchase price of RM2,500,000 ('exh P36').

[10] PW3 then secured Mobil Malaysia Sdn Bhd to lease the land heid under EMR 278 Lot 1699 for a sum of RM3.4m to operate as a petrol pump.

[11] Messrs LM Ong & Co rendered all the necessary legal assistance to all the parties throughout the transaction in respect of the completion of the sale of the properties to give full effect to the terms of the said trust deed cum declaration.

[12] Sometime on 18 February 1995, the whole of the purchase price for both the lands was paid to Messrs LM Ong & Co as stakeholders for all parties by Shearn Delamore & Co who was the solicitor acting for Mobil Malaysia Sdn Bhd that is, the lessee who intended to operate a petrol pump station on Lot 1699.

[13] Subsequently about three to four months after the monies were released to Messrs LM Ong & Co, the defendant husband Mr See informed the plaintiffs that Miss Serene Ong was allegedly doing some unlawful acts contrary to the terms and conditions of the said trust deed cum declaration.

The defendant's husband Mr See convinced a plan to prepare letters dated 12 June 1995 and 14 June 1995 and statutory declaration dated 7 December 1996 and requested the plaintiffs to sign these documents solely for the purpose to contest a civil case against Miss Serene Ong of Messrs LM Ong & Co in the civil suit filed by the defendant against Messrs LM Ong & Co. Sometime in May 1998 the plaintiffs met Miss Serene Ong of Messrs LM Ong & Co and the plaintiffs were shown the entire file and all the correspondences some of which were not in the plaintiffs' possession. It was at this stage the plaintiffs discovered and realised that the defendant and her husband Mr See had somewhere along the line decided to cheat the plaintiffs of the agreed share in Lot 1698 pursuant to the joint venture.

[14] The plaintiffs were informed by Miss Serene Ong that the land owners had signed the memorandum of transfer and the said Mr See attempted to induce Miss Serene Ong into transferring Lot 1698 to the defendant on false allegations that the plaintiffs had withdrawn their entitlement of shares on Lot 1698.

[15] Miss Serene Ong of Messrs LM Ong & Co refused to do so without the prior consent of the plaintiffs and as such Miss Serene Ong took the necessary steps and deposited the original title deed of Lot 1698 in this honourable court until the parties to the joint venture resolved their disputes on the transfer of shares on Lot 1698.

[16] By virtue of the declaration cum trust deed exh P3, the plaintiffs alleged that they were entitled to their respective shares as stipulated therein in respect of Lot 1698 as their profits for the successful lease of Lot 1699 to Mobil Malaysia Sdn Bhd and the defendant as the nominee of the joint venture partners had failed or refused to transfer the shares to the plaintiffs as agreed in P3.

THE DEFENDANT'S CASE

[17] According to the defendant, the defendant and her husband Mr See knew the first plaintiff who had been working for a long time with a legal firm, Messrs Yeow & Chin. After quiting from the legal firm the first plaintiff then worked as a land broker. The first plaintiff told them that he had obtained an option to sell two pieces of land that is, Lot 1698 and Lot 1699 from one Madam Chia. The defendant said she could buy up the said lands and she wanted the land owner to grant her the option.

[18] The land owner then granted to the defendant an option to purchase/sell dated 1 November 1993 exh D15.

[19] She then entered into a sale and purchase agreement with the vendor for the purchase of the two pieces of land for RM2,392,259.43 at the end of December 1993. However Miss Serene Ong had dated it 21 December 1993 ('P2'). Under the said agreement, the defendant had to pay RM50,000 before signing the agreement, the balance of the 10% deposit that is, RM189,225.95 to be paid within three months from signing the agreement and the balance of 90% of the purchase price was to be paid within six months of the date of signing the agreement. She said she had paid the RM50,000 in two bank drafts (one is RM15,000 of Chung Khiaw Bank Ltd and the other RM35,000 of D & C Bhd) in the name of LM Ong & Co.

[20] The defendant explained that when Madam Chia the vendor granted her the option on 1 November 1993 to purchase the two lots of land she had initially sold Lot 1699 to Mr Tang for RM2.5m and Mr Tang had paid RM15,000 to her by way of cheque and the remaining RM235,000 being the balance of 10% to be paid later. When Mr. Tang could not pay the balance of the 10%, he then asked the defendant's husband Mr See to jointly purchase the said Lot 1699. The sale and purchase agreement between Mr Tang and the

defendant was aborted and the said Lot 1699 was finally sold by the defendant to Genting Impian in which Mr See and Mr Tang held 70% and 30% share respectively (see exh P36).

[21] The defendant explained further that she paid the RM50,000 deposit by two bank drafts that is, RM15,000 and RM35,000. She said she used the RM15,000 cheque deposit given by Mr Tang for the purchase of Lot 1699 which was aborted to buy a bank draft of RM15,000 from Chung Khiaw Bank. She further said that she used another RM35,000 given by her husband (Mr See) to purchase the other bank draft for the same amount from D & C Bank. The defendant also said that as she needed a longer period to complete the purchase of the two pieces of land, she then entered into another supplemental agreement dated 20 May 1994 with Madam Chia, the vendor for the purchase price to be increased from RM2,392,259.43 to RM2,511,929.64.

[22] She claimed that she never agreed to be a partner to the joint venture as alleged by the plaintiffs.

[23] The defendant had claimed that she had no knowledge of the contents of the declaration cum trust deed cum power of attorney dated 6 January 1994 ('P3') and she was asked to sign several blank sheets of document at the office of Messrs LM Ong & Co and she pleaded that the P3 was not her deed (non est factum) and was void.

[24] The alternative defence was that if there exists a valid trust deed, it was subsequently revoked and withdrawn by the plaintiffs because of the purported several letters and documents written by them.

THE FIRST ISSUE

[25] Whether the document known as 'Declaration cum Trust Deed Cum Power of Attorney' dated 6 January 1994 ('exh P3') is valid in law and binding on the defendant?

THE DEFENDANT'S CONTENTION

[26] The defendant has seriously challenged the validity of exh P3 on the following grounds:

(a) She was asked to sign a few blank sheets of paper by Miss Serene Ong ('PW1') in the office of Messrs LM Ong & Co. Therefore the exh P3 was not her deed (non est factum) and void.

(b) Miss Serene Ong was not a credible witness and her testimony that she alleged that Madam Ho ('the defendant') signed the 'Trust Deed' P3 in

her presence ought to have been disregarded for the following reasons:

(i) Miss Serene Ong told the court that she was acting for the vendor Madam Chia in her sale of Lot 1698 and Lot 1699 to the defendant. She also testified that she was also acting for the defendant in the same transaction. The defendant submits that Miss Serene Ong should not have acted for both the opposing parties of the same transaction.

(ii) Miss Serene Ong testified that she first met Madam Ho (the defendant) on 21 December 1993 and the second occasion on 6 January 1994 and the last occasion on 29 December 1994. The defendant submits that the above statements amount to an admission that Miss Serene Ong did not meet the defendant to let her sign the second agreement on 20 May 1994 ('D49'). The second agreement contained the defendant's signature and appears to have been attested by Miss Serene Ong. The defendant therefore submits that since Miss Serene Ong did not meet the defendant in May 1994 and the defendant also did not meet Miss Serene Ong in May 1994, the logical conclusion is that Miss Serene Ong used the blank sheets signed by the defendant in December 1993 to create the second aagreement in May 1994 and also the trust deed exh P3 in January 1994.

(iii) The first plaintiff ('PW2') himself in his letter of complaint dated 6 March 1992 to the Advocates and Solicitors' Disciplinary Board ('D19') has stated in no uncertain terms that Miss Serene Ong made the defendant sign blank sheets of paper and that the trust deed (P3) was created by using those papers.

(iv) It is deceitful for Miss Serene Ong as a solicitor to prepare two different versions of a letter purportedly written by a client to her firm. (See pp 62–64 and pp 65 to 66 of bundle B). The defendant admited that the signature in the first letter at p 64 was her signature whereas the signature in the second letter at p 66 was a forgery. She had lodged a police report (p 59 of bundle C — exh D46) that Miss Serene Ong submitted a letter with a forged signature to the Advocates and Solicitors Disciplinary Board. The defendant alleged that the second letter (at pp 65 and 66 of bundle B) was a letter drafted to nullify the writer's complaint against Miss Serene Ong. The defendant submits that whatever the truth might be, the testimony of Miss Serene Ong that she prepared two different versions of a letter of the same date for the same person to write to her firm shattered her own credibility. It justifies a submission that her evidence ought to be given no weight at all.

(c)

(i) The exh P3 is an incompletely constituted trust and is void and unenforceable.

The defendant submits that the evidence adduced shows that the document P3 relied upon is an incompletely constituted trust because the wording of P3 is an attempt to make the defendant declare herself as trustee holding on trust the percentage stated in cl 2(2) which was for the first plaintiff 30% of the lot 1698 and 25% of the Lot 1698 for the second plaintiff. However on the date the purported trust deed was created, the defendant was still not the beneficial owner of the two lots because based on the two contracts signed one on 21 December 1993 ('first agreement') and the other on 20 May 1994 ('the second agreement'), the full payment of the purchase price was yet to be paid to the defendant. Therefore the defendant had no vested interest in the two lots. In the circumstances, the defendant and the vendor were only parties to a contract of sale and purchase. For the above reasons, the defendant submits that the declaration of trust ('P3') dated 6 January 1994 was an incompletely constituted trust and was void. The defendant relied on two authorities in support of her contention:

(1) Federal Court Case in *Borneo Housing Mortgage Finance Bhd v Time Engineering Bhd* [1996] 2 MLJ 12.

(2) Court of Appeal case in *Koperasi Wanita Sarawak Bhd & Anor V Robert Sim Teck Hock* [2005] 4 MLJ 493.

(ii) The plaintiffs were volunteers:

The defendant further submits that both plaintiffs did not pay a single cent towards the purchase of the two lots, applying the judgment of the Court of Appeal in *Koperasi Wanita Sarawak Bhd's* case to the facts of this case, both the plaintiffs are therefore beneficiaries who are volunteers. The defendant further submits that it is trite law that the court would not render assistance to a volunteer in the case of an incompletely constituted trust.

(d) The defendant further submits that even if the court were to hold that exh P3 was intended to be a contract, it must be signed by all the parties to the contract and not unilaterally by one party. It is elementary contract law that there must be consideration for a contract to be valid. In this case the plaintiffs failed to adduce evidence that they had given any consideration for the purported contracts' signed by Madam Chia. However, the defendant submits that the plaintiffs alleged cause of action was based on trust and not on contract.

THE PLAINTIFFS' REPLIES

On the issue of incompletely constituted trust

[27] The plaintiffs submit that the issue was not pleaded in the defendant's defence that the declaration cum trust deed dated 6 January 1994 (exh P3) is void as it is an incompletely constituted trust. The plaintiffs therefore submits that the principles laid down in *Borneo Housing Mortgage Finance Bhd's* case and the *Koperasi Wanita Sarawak Bhd's* case are not applicable to this case.

[28] In reply to the issue that the incompletely constituted trust deed was not pleaded, the defendant submits that it was pleaded in the defence that the declaration cum deed of trust P3 is void. Since a document might be void due to more than one ground, the defendant is not required to plead the particular ground but is entitled to adduce evidence to show the ground which renders the document void.

[29] However if at all the court holds that P3 is an incompletely constituted trust, the plaintiffs submits that the court should render assistance to the plaintiffs as they are not volunteers and in fact valuable consideration has been provided by the plaintiffs.

[30] The plaintiffs have pointed out that it was the first plaintiff who introduced Madam Chia to the defendant and the first plaintiff in his witness statement has stated that Madam Chia only believed him and it was because of that Madam Chia had agreed to grant the option to sell/purchase to the defendant ('P2'). Mr Tang ('PW3') who had named his wife the second plaintiff as his nominee had agreed to secure Mobil Oil Malaysia Sdn Bhd to lease Lot 1699 from Genting Impian.

On the issue whether the defendant was asked to sign blank sheets of paper by the PW1?

[31] The plaintiffs submit that the allegations that the defendant was asked to sign blank documents and then Miss Serene Ong had prepared P3 and the supplementary agreement exh D49 are merely bare denials and should not be entertained by this court on the following grounds:

(a) The plaintiffs submit that it is highly unreasonable and illogical to accept the defendant's version that she was asked to sign all the blank sheets of paper as the solicitor told her to do as the transaction of the sale of the lands involved a huge sum of RM2.5m. Any reasonable person would not have done so under the circumstances.

Based on the evidence of Miss Serene Ong ('PW1') and the first plaintiff, the plaintiffs submit that it is an established fact that the defendant signed P3 in the office of Messrs LM Ong & Co and the contents of which had been witnessed by Miss Serene Ong, Mr See, Madam Chia, Mr Tan. The plaintiffs therefore urge the court to reject the defendant's plea of non est factum.

(b) Her version was in direct conflict with the version given by a very senior solicitor Miss Serene Ong ('PW1') from a very reputable firm in Johor Bahru. The court should believe Miss Serene Ong when she said she did not at any material time ask the defendant to sign blank documents and she did not resort to such an unprofessional practice.
Miss Serene Ong also testified that she had explained the contents of the document to the defendant in Hokkien and the first plaintiff and Mr See had also explained the contents of the document to the defendant in Mandarin.

On the credibility of Miss Serene Ong ('PW1')

[32] On the issue of the credibility of Miss Serene Ong PW1, the plaintiffs submit that Miss Serene Ong being a very senior solicitor from a very reputable firm that is, LM Ong & Co is a witness of truth. As regards the D49 (the second agreement) which was purportedly signed by the defendant and witnessed by Miss Serene Ong on 20 May 1994, the plaintiffs submits that the defendant should have asked Miss Serene Ong herself as to when D49 was executed. It is most unfair for the defendant to draw an inference from certain statements made by Miss Serene Ong that she did not meet the defendant on 20 May 1994 especially when Miss Serene Ong was not questioned at all as regards the said document, that is, D49.

Ruling by the court on the first issue

[33] Having perused the evidence adduced, I find that the plaintiffs have established the following facts on the balance of probabilities:

(a) A joint venture was formed by the first plaintiff, Mr See and Mr Tang ('PW3') to purchase the said lands from the vendor Madam Chia. They then elected the defendant (Mr See's wife) as their nominee for the sale and purchase of the said lands.

(b) The terms and conditions of the joint venture agreement were stated in the declaration cum trust deed cum power of attorney dated 6 January 1994 (exh P3).

(c) P3 was a document prepared by Miss Serene Ong ('PW1') on the

instructions of the three joint venture partners. The terms and conditions of P3 had been explained by PW1 to the defendant in the presence of first plaintiff, Mr See and PW3.

PW1 is a truthful witness

[34] Having examined the evidence given by Miss Serene Ong ('PW1') and having observed her demeanour in court, I find that she is a witness of truth for the following reasons:

(a) PW1 is an advocate and solicitor attached to Messrs LM Ong & Co which is a reputable legal firm in Johor Bahru.

(b) She has been practising for about 38 years both in conveyancing and litigation matters.

(c) She could answer all the questions posed during cross-examination without hesitation and with full confidence and her evidence was never shaken throughout the trial.

(d) When coming to the crunch, she had stated in no uncertain terms that she had never asked anyone to sign any blank piece of paper. She further testified that she would ensure that any piece of paper or document to which her signature was fixed as a witness or attested had not only been signed in front of her own eyes but had been personally explained by her.

(e) She is a neutral witness so to speak vis-a-vis the plaintiffs and the defendant as there is no evidence adduced that she had a direct interest in the matter.

(f) On the issue whether Miss Serene Ong's evidence was contradicted by the first plaintiffs testimony that Miss Serene Ong did in fact ask the defendant to sign several blank sheets of paper, I find that the first plaintiff is an unreliable witness and his evidence must be treated with caution as I find that there are serious discrepancies in his own testimony which had destroyed his credibility.

On the credibility of the defendant

[35] Having perused the evidence of the defendant vis-a-vis the evidence of Miss Serene Ong, I find that her version that she had no knowledge of the existence of P3 and she was asked by Miss Serene Ong to sign a few sheets of blank paper together with the reasons given by her in support of her contention

to be highly unreasonable and unacceptable for the following reasons:

(a) Her version was totally in contradiction to the version given by Miss Serene Ong ('PW1'), a senior practitioner whom I believe to be a witness of truth.

(b) Her reasons that she trusted Miss Serene Ong to sign some blank sheets of papers which would be used later as signature for making agreement with the vendor because it was difficult for her to find parking at Jln Ibrahim and she could not go the Miss Serene Ong's office promptly when requested to do so are inconceivable, unreasonable and unacceptable simply because the sale of the lands in which she was a buyer involved a huge sum of money that is, RM2.5m and any reasonable person would not have done so even if he was instructed by a solicitor to do so.

[36] When the defendant told the court that she was not the nominee of her husband (Mr See) and she bought the lands with her own money and she was solely liable to the vendor, I am very doubtful of what she said for two reasons:

(a) I am not convinced that she was financially sound to purchase the two lands on her own as no evidence to that effect has been adduced.

(b) From the evidence adduced in totality, I find that the plaintiffs' version that it was the joint venture which had purchased the two plots of lands from the vendor with the defendant as a nominee to be more probable.

[37] The defendant also attacks the credibility of PW1 on the following grounds:

(a) She had acted for two opposing sides that is, vendor and the purchaser;

(b) She prepared two different versions of a letter dated 29 December 1994 purportedly signed by the defendant to her firm about the same transaction;

(c) The evidence of Miss Serene Ong that she last met the defendant on 6 January 1994 and did not see her again until 29 December 1994 has contradicted the second agreement purportedly signed by the defendant and witnessed by Miss Serene Ong on 20 May 1994. This has thrown doubt on her credibility.

[38] I find that the fact that the solicitor acting for both the purchaser and the vendor in a sale and purchase transaction 20 years back with their consent will not by itself shatter her credibility in this suit especially the defendant failed to show the court that whether Miss Serene Ong had infringed any rules governing sale and purchase of properties at that time.

[39] I accept the explanation of Miss Serene Ong PW1 that the two versions of the letter dated 29 December 1994 by the defendant to her firm were prepared by her, that is, the first letter on the instruction of the defendant and the second letter was the instruction of the defendant's husband, Mr See and Miss Serene Ong explained that the first letter is basically the same as the second letter. What is important here is both the letters were prepared on the instruction of the client. The lodging of a police report by the defendant that the alleged signature in the first letter was forged does not prove that the alleged signature was forged. I also find that this ground is not sufficient to destroy the credibility of PW1.

[40] Last but not least, I do not agree with the submission of the defendant that the existence of the agreement dated 20 May 1994 ('D49') has thrown doubt on the credibility of Miss Serene Ong just because she told the court that she last saw the defendant on 6 January 1994 and she did not see her again until 29 December 1994. I am of the view that the defendant should have asked Miss Serene Ong to explain the existence of the agreement D49 as she had appeared as a witness for the plaintiffs in court. However the defendant chose not to ask Miss Serene Ong about D49 for reasons best known to her.

[41] For the above reasons, I find that the aforesaid attacks on the credibility of Miss Serene Ong were without merits.

Whether P3 is an incompletely constituted trust or contract.

[42] On the issue whether the document ('P3') is void as an incompletely constituted trust as alleged by the defendant, the plaintiffs submit that since the issue of incompletely constituted trust was never pleaded in the defence, the defendant should not be allowed to raise the issue now.

[43] I agree with the submission of the defendant that it is sufficient to plead in the defence that the document P3 was void and a document might be void for various grounds and the defendant is entitled to rely on any ground based on the evidence adduced during the trial to prove that P3 was void on the ground that it was an incompletely constituted trust. Even if the defendant could prove that P3 was an incompletely constituted trust, I am of the considered view that the court must still render assistance to the plaintiffs beneficiaries who were not volunteers as they had played their respective roles which are tantamount to considerations to the sale and purchase transactions.

[44] Be that as it may, having perused the evidence adduced, I find that P3 which is couched in the terms of trust deed was intended to be part of a joint venture agreement. In fact P3 must be read together with the first agreement

('P2') and the second agreement ('D49') to constitute the joint venture agreement entered into by the three joint venture partners with the defendant as their nominee.

[45] However the defendant submits that if P3 was intended to be a contract that contract was void for two reasons:

(a) That the contract was void it was not signed by all parties to the contract and

(b) The parties to the contract that is, the first plaintiff and the second plaintiff did not furnish any consideration for the said contract.

[46] I find that such submission is without merit. Firstly, it has been established that there was a verbal joint venture agreement entered by the three joint venture partners and the terms and conditions of such joint venture agreement were reduced into writing in, P3 which was agreed to and signed by the defendant alone.

[47] Secondly, the plaintiffs have also proved that the first plaintiff has furnished consideration by introducing the vendor Madam Chia to Mr See and the defendant and PW3 who has named the second plaintiff as his nominee has also agreed to secure Mobil Oil Malaysia Sdn Bhd to lease Lot 1699 from Genting Impian.

[48] For the above reasons, I rule that P3 is a valid document and the defendant is bound by its terms and conditions.

SECOND ISSUE

[49] Since I hold that P3 dated 6 January 1994 was a valid document which binds the defendant, the next issue is whether the subsequent documents namely P25, P26, P29 and P37 made and signed by the plaintiffs respectively had effectively revoked their respective shares as stated in P3 between the plaintiffs and the defendant.

[50] It has been established that both the plaintiffs had canceled their participation in the joint venture and had surrendered back their respective shares to the defendant as envisaged in the declaration cum trust deed cum power of attorney ('P3') vide their respective letters marked as P25 (first plaintiff), P37 (second plaintiff) and their respective statutory declarations marked as P26 (first plaintiff) and P29 (second plaintiff).

[51] The plaintiffs submit that the existence and the contents of P25, P26,

P37 and P29 are a fact. But the purpose for which P25, P26, P37 and P29 was prepared and executed was all upon the request of the defendant's husband Mr See who had informed the first plaintiff, Mr Tang that after the monies have been released, that Miss Serene Ong was allegedly doing some unlawful acts contrary to the terms and conditions of P3. Mr See had requested the first plaintiff and second plaintiff to sign all these letters prepared by Mr See that is, P25 and P37 and statutory declaration that is, P26 and P29 which purportedly stated that the first plaintiff and the second plaintiff had withdrawn themselves from the joint venture agreement with regards to their shares in Lot 1698. At that material time Mr See the defendant's husband told them that the purpose of requesting them to sign these letters and statutory declarations was solely for using such documents as evidence to contest a case against Miss Serene Ong of Messrs LM Ong & Co in the civil suit filed by the defendant.

[52] The plaintiffs further refer to the evidence of the defendant during trial to establish the fact that the defendant was again misleading this honourable court by giving false and untrue statements in the said letters and the contents were fabricated by the defendant's husband Mr See after receiving letter dated 29 May 1995 from Miss Serene Ong. The letter dated 29 May 1995 was from Miss Serene Ong to the defendant, PW2 and second plaintiff to fix an appointment to see Miss Serene Ong to execute the memorandum of transfer of Lot 1698 as per the agreed shares in the P3.

Evaluation of evidence and ruling

[53] Having perused the evidence adduced, I find that the plaintiffs' allegations that the contents of the letters and the statutory declarations were fabricated by the defendant's husband Mr See and the said letters and the statutory declarations were solely for the purpose of using such documents as evidence to contest a case against Messrs LM Ong & Co are totally baseless and should be rejected outright.

[54] I find that the letters (P25 and P37) are voluntarily signed by the plaintiffs. They were fully aware of their contents. There was no evidence to show that the plaintiffs were forced to sign the said letters or they were cheated of their contents. They are therefore bound by the terms contained therein.

[55] As regards the statutory declarations (P26 and P29), they are the sworn statements affirmed by both the plaintiffs. Similarly the plaintiffs knew the contents of the statutory declarations which they signed. There was also no evidence to show that they were forced to sign the said documents or they were cheated of their contents. Under the circumstances the plaintiffs are therefore bound by what they had sworn in their respective statutory declarations. They

cannot deny the truth of the contents of such documents. They knew the consequences of giving any false statements under oath.

[56] On the other hand, if the court were to believe the plaintiffs' version that the contents of the documents were actually fabricated by the defendant's husband Mr See to be used as evidence in a civil suit against Miss Serene Ong of Messrs LM Ong & Co the plaintiffs by signing such documents had committed an offence of making false declaration and had further committed an offence of aiding and abetting Mr See in fabricating evidence in a civil suit against Messrs LM Ong & Co.

[57] I find that the plaintiffs' version is not only unreasonable but also unacceptable. I also find that they are bound by their own statements which were made voluntarily and under oath.

[58] For the above reasons, I find that the subsequent documents namely P25, P37, P26 and P29 made and signed by the plaintiffs have effectively revoked their respective shares as stipulated in P3.

[59] In the circumstances, I find that the plaintiffs have failed to prove their claims against the defendant on the balance of probabilities. I dismiss the plaintiffs' claim with cost of RM10,000.

Claim dismissed with costs of RM10,000.

Reported by Afiq Mohamad noor